RECORD AND BRIEFS

Nos. 16-285, 16-300, and 16-307

In the Supreme Court of the United States

EPIC SYSTEMS CORPORATION
v.
JACOB LEWIS

ERNST & YOUNG LLP, ET AL.
v.
STEPHEN MORRIS, ET AL.

NATIONAL LABOR RELATIONS BOARD
v.
MURPHY OIL USA, INC., ET AL.

On Writs of Certiorari to the United States Courts of Appeals for the Fifth, Seventh, and Ninth Circuits

BRIEF OF AMERICAN ASSOCIATION FOR JUSTICE AS AMICUS CURIAE SUPPORTING RESPONDENTS IN NOS. 16-285 & 16-300 AND PETITIONER IN NO. 16-307

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INTEREST OF *AMICUS CURIAE*[1]

The American Association for Justice (AAJ), formerly known as the Association of Trial Lawyers of America, was established in 1946 to safeguard victims' rights, strengthen the civil-justice system, and protect access to the courts. With members in the United States, Canada, and abroad, AAJ is the world's largest trial bar. Throughout its history, AAJ has served as a leading advocate for the right to trial by jury.

AAJ files this brief to demonstrate how the extreme view of the Federal Arbitration Act urged by the employers in this case would, if adopted by this Court, upset decades of settled expectations about the role of arbitration across the economy. This brief draws on AAJ's expertise to inform the Court of the forty years of regulatory actions—by over a dozen federal agencies, under every modern presidential administration—limiting arbitration to protect federal statutory rights. Because AAJ has taken part in many of these rulemakings through the notice-and-comment prccess, it has considerable expertise when it comes to federal agency regulations on arbitration.

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[1] No counsel for a party authored this brief in whole or in part and no person other than *amicus* and its counsel made a monetary contribution to its preparation or submission. The parties' letters consenting to the filing of *amicus* briefs are on file with the Clerk.

INTRODUCTION AND SUMMARY OF ARGUMENT

For over forty years, federal agencies have written rules limiting or regulating the use of arbitration. Over a dozen agencies have done so, under presidential administrations led by both political parties, to protect the statutory rights of investors, military servicemembers, farmers, airline passengers, nursing-home patients, and others. Some of these agencies have deployed their statutory authority to craft broad, generally applicable rules, while others have placed conditions on the receipt of federal funds or other voluntary decisions by regulated entities. These rules have engendered considerable reliance across all sectors of our economy.

Thirty years ago, this Court unanimously recognized that a federal agency may employ its delegated statutory authority—even if that authority says nothing specific about arbitration—to adopt "rules it deems necessary to ensure that arbitration procedures adequately protect statutory rights." *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 233-34 (1987); *see also City of Arlington v. FCC*, 133 S. Ct. 1863, 1884 (2013) (explaining that, when Congress delegates to an agency a "general conferral of rulemaking authority," the "whole includes all of its parts"). This Court's later FAA decisions have in no way undercut that recognition or otherwise addressed the interplay between agencies and the FAA. *But cf. CompuCredit Corp. v. Greenwood*, 565 U.S. 95, 103 (2012) (addressing the markedly different question whether Congress *itself* has decided to prohibit arbitration).

Although this case does not involve a direct challenge to any federal regulation, this Court should nonetheless be mindful of the many agency regulations—and the

reliance that they have fostered—in reaching its decision. In these three consolidated cases, the question presented is whether employers may require their employees to sign binding agreements waiving their rights to pursue *any* employment claim in *any* forum—judicial or arbitral—on a class basis. More specifically: Is the enforcement of a binding arbitration agreement that bars employees from pursuing claims on a collective basis mandated by the Federal Arbitration Act, even if that agreement violates substantive protections? And relatedly: Should the FAA be read to displace limits on arbitration that are necessary to protect statutory rights? The employers' answer: yes, to all of the above.

But there is no support, either in this Court's cases or in Congress's enactments, for the employers' position. They seek to rewrite this Court's precedents by crafting a new test for ascertaining the existence of a conflict between a statute and arbitration. Under their test, a conflict exists unless there is an express textual reference to arbitration in the statute. Without that reference, they effectively argue, no agency action regulating, defining, or limiting arbitration is permissible. But, following its enactment in 1925, the FAA has never been read to alter the established view that a general delegation of authority may empower an agency to write rules limiting or conditioning arbitration.

The employers' contrary view threatens dozens of vital and lawful regulations as well as the settled view of the FAA. In light of statutory *stare decisis* principles, this Court should exercise caution, adhere to its prior precedent, and leave room for federal agencies to continue to regulate arbitration where expert regulators conclude that doing so is necessary to protect substantive rights.

ARGUMENT

I. Decades of federal agency regulations governing arbitration have engendered reliance across a range of industries.

The employers urge this Court to adopt a new, unforgiving understanding of how the FAA interacts with agency authority: Unless the text of a federal statute specifically and expressly delegates regulatory authority to the agency over arbitration, no regulation of arbitral procedures is permitted. That unprecedented theory would reach far beyond the boundaries of this case, upsetting the reliance interests of industries regulated under general congressional delegations to numerous federal agencies—including the Departments of Agriculture, Commerce, Education, Health and Human Services, Labor, Transportation, and Treasury, as well as independent agencies such as the Federal Trade Commission and the Securities and Exchange Commission.

As this Court first explained in *McMahon*, an agency's general delegated authority may include the "expansive power" to "mandate the adoption of any rules it deems necessary to ensure that arbitration procedures adequately protect statutory rights." 482 U.S. at 233-34. That rule holds true even where—as with the SEC—the agency's substantive statute does not contain any textual reference to arbitration. As a result, agencies have long regulated on the settled understanding that arbitration—no less than any other topic—is subject to an agency's delegated regulatory authority.

A. The SEC has shaped the securities industry's expectations through its broad authority to limit and regulate arbitration.

The SEC, a product of the New Deal, began its oversight of securities arbitration in 1934. *See, e.g.*, Sec. &

Exch. Comm'n, Opinion Letter, Release No. 34-131, 1935 WL 29028 (Mar. 21, 1935). The Maloney Act of 1938 gave the SEC "fairly pervasive authority" to govern entirely new organizations, "in large measure creations of the Congress," whose sole purpose was to provide a mechanism for industry self-regulation.[2] Today, the largest of these self-regulatory organizations (SROs) is the Financial Industry Regulatory Authority (FINRA).[3]

The SEC's active role in the SROs' self-regulation has significantly increased over the past eighty years. Without specifically mentioning arbitration, the 1975 amendments to the Securities and Exchange Act effectively gave the SEC even broader authority to regulate securities arbitration. Congress mandated that "[n]o proposed rule change shall take effect" without the SEC's approval, 15 U.S.C. § 78s(b)(1), and the SEC was authorized to "abrogate, add to, and delete from . . . the rules of a self-regulatory organization," *id.* § 78s(c). As this Court later recognized, this general rulemaking authority gave the SEC an "expansive power to ensure the adequacy of the arbitration procedures employed by the SROs." *McMahon*, 482 U.S. at 233.

Over the following years, the SEC took an even more active role in overseeing and approving the SROs' rules governing arbitral procedures. The SEC, deploying this

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[2] Philip A. Loomis, Jr., Commissioner, Sec. & Exch. Comm'n, Address at the Joint Securities Conference: The Securities Acts Amendments of 1975, Self-Regulation and the National Market System (Nov. 18, 1975), https://perma.cc/9U8X-U2G2.

[3] In 2007, the New York Stock Exchange merged its regulatory and arbitration functions with the National Association of Securities Dealers, which was founded in 1939—forming FINRA. *See* Press Release, *FINRA, NASD and NYSE Member Regulation Combine to Form the Financial Industry Regulatory Authority*, Fin. Indus. Reg. Auth. (July 30, 2007), https://perma.cc/MG2P-JCCY.

newly delegated authority, helped form the Securities Industry Conference on Arbitration (SICA)[4] to develop uniform arbitration rules.[5] These efforts resulted in the adoption of a Uniform Arbitration Code by all SROs in 1979,[6] and solidified securities arbitration procedures.

The SEC's authority to regulate arbitration has long included regulation designed to protect investors right to seek classwide relief. The SEC was among the first federal agencies to regulate arbitration to preserve the availability of class action lawsuits.[7] In 1989, the SEC sought a uniform industry position on the proposal that class actions be directed to the courts.[8] And, in January 1992, the Commission approved rules to that end developed by SICA for the Uniform Arbitration Code. *See* 57 Fed. Reg. 52659, 52660 (Nov. 4, 1992). The SEC then endorsed a rule prohibiting FINRA members from

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[4] SICA was formed by a majority of representatives of the investing public (including claimants' lawyers), a securities industry representative, and representatives of various securities regulators. *See White Paper on Arbitration in the Securities Industry*, Sec. Indus. & Fin. Mkts. Ass'n 11 (Oct. 2007), https://perma.cc/KNG8-NRWQ.

[5] Jill I. Gross, *Historical Basis of Securities Arbitration as an Investor Protection Mechanism*, 1 J. Dispute Resolution 171, 175–182 (2016).

[6] *See, e.g.*, 44 Fed. Reg. 43377 (July 24, 1979) (Midwest Stock Exchange); 44 Fed. Reg. 43378 (July 24, 1979) (New York Stock Exchange); 44 Fed. Reg. 75255 (Dec. 19, 1979) (National Association of Securities Dealers, Inc.).

[7] Jean R. Sternlight, *As Mandatory Binding Arbitration Meets the Class Action, Will the Class Action Survive?*, 42 Wm. & Mary L. Rev. 1, 45 (2000).

[8] *SEC Approves Arbitration Summaries, Other Revisions to Industry Programs*, 21 Sec. Reg. & L. Rep. (BNA) 683, 684 (May 12, 1989).

compelling arbitration against members of certified or putative class actions. 57 Fed. Reg. 30519, 30520 (July 9, 1992). Under that rule, any arbitration agreement must "clearly state that class action claims are specifically outside the scope of arbitration contracts." *Id.* Following that rulemaking, the SEC reviewed and approved parallel changes to the other SROs' internal rules.[9]

In the thirty years since *McMahon* first embraced the SEC's power to regulate the role of arbitration, the agency has engaged in multiple rounds of arbitration-related rulemakings. In 1999, for example, the Pacific Stock Exchange made arbitration for certain employment-related claims subject to the parties' continued agreement to arbitrate. *See* 64 Fed. Reg. 25096, 25097 (May 10, 1999). More recently, FINRA revised and rewrote in plain English the Uniform Arbitration Code. *See* 72 Fed. Reg. 4574, 4580 (Jan. 31, 2007). And, in 2012, the SEC approved a rule change to clarify that collective actions brought by employees of member firms under the Fair Labor Standards Act, the Age Discrimination in Employment Act, or the Equal Pay Act may not be arbitrated. *See* 77 Fed. Reg. 22374 (Apr. 13, 2012).

For twenty-five years, every FINRA member has complied with and relied upon this regime.[10] Thanks to the SEC's oversight, financial markets have long operated under this dispute-resolution framework: class actions

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[9] *See, e.g.*, 58 Fed. Reg. 48680 (Sept. 17, 1993) (American Stock Exchange); 58 Fed. Reg. 42588 (Aug. 10, 1993) (Pacific Stock Exchange); *see also* 59 Fed. Reg. 4299 (Jan. 31, 1994) (clarifying that the exclusion of class action claims from FINRA arbitration applies to actions brought by employees as well as by customers).

[10] *See* Barbara Black & Jill I. Gross, *Investor Protection Meets the Federal Arbitration Act*, 1 Stan. J. Complex Litig. 1, 24–29 (2012).

in courts, individual actions in arbitration. Because, "[a]s a practical matter, all securities firms dealing with the public must be members of FINRA," *Fiero v. FINRA, Inc.*, 660 F.3d 569, 571 (2d Cir. 2011), the entire securities industry abides by the FINRA rules—including its arbitration regulations and its rules preserving the right to sue on a class basis, *see* FINRA By-Laws, Art. IV. But the SEC's regulation in this area, and the securities industry's reliance on it, represents just a fraction of the agency arbitration rules threatened by an unnecessarily expansive ruling in this case.

B. Many other federal agencies have solidified industry expectations by acting on their broad authority to limit and regulate arbitration.

When it comes to arbitration, the SEC is far from alone. In rules designed to protect farmers, students, airline passengers, workers, and nursing-home patients, among others, dozens of federal agencies have long regulated arbitration within the statutory schemes that they oversee. Their goal has been to ensure fulfillment of their congressional mandates by securing fair dealing among industry participants and meaningful forms of redress for aggrieved parties. Some agencies have regulated arbitration in general terms. And others have made the availability of benefits or funding conditional on specific limits on arbitration, such as preserving the right to bring class actions.

Like their counterparts in the securities sector, these regulators have relied on the understanding that arbitration falls comfortably within an agency's general congressional delegation. Even if an agency's substantive statute says nothing about arbitration, a general congressional delegation constitutes "sufficient statutory authority" to adopt any rules "necessary to ensure that

arbitration procedures adequately protect statutory rights." *McMahon*, 482 U.S. at 234, 238.

Since *McMahon*, these regulations have been neither controversial nor novel: From Ford to Obama, agencies under every administration have promulgated rules designed to regulate the use of arbitration across a broad range of industries. And these decades of tailored regulatory action have solidified the "reliance interests of regulatees who conform[ed] their conduct to th[os]e regulations." *Natural Res. Def. Council v. Nuclear Regulatory Comm'n*, 666 F.2d 595, 602 (D.C. Cir. 1981).

1. To start, various federal agencies have regulated arbitration by relying on their general authority to protect statutory rights of various parties.

Car Buyers. The Federal Trade Commission has for twenty years written rules restricting the use of pre-dispute forced arbitration clauses in auto warranty agreements, invoking its statutory authority under the Magnuson-Moss Warranty Act to "prescribe rules setting forth minimum requirements for any informal dispute settlement procedure." *See* 15 U.S.C. § 2310(a)(2); *see also* 40 Fed. Reg. 60168, 60190 (Dec. 31, 1975); 64 Fed. Reg. 19700, 19708 (Apr. 22, 1999); 80 Fed. Reg. 42710 (July 20, 2015). This limitation has engendered vast reliance across the auto industry, which has relied on non-binding arbitration for at least a decade.[11]

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[11] *See, e.g.*, *National Center for Dispute Settlement (Automobile Warranty Arbitration Program) 2015 Audit*, U.S. Fed. Trade Comm'n 4 (2016) (finding arbitration of Chrysler, Honda, Mitsubishi, Suzuki, Tesla, and Toyota in compliance with FTC rules), https://perma.cc/RR38-KG5M; *National Center for Dispute Settlement (Automobile Warranty Arbitration Program) 2008 Audit*, U.S. Fed. Trade Comm'n 4 (2009), https://perma.cc/3XKZ-KMMH (same).

And car manufacturers have embraced the goals of the FTC's regulation to the point of voluntarily exceeding its baseline requirements and making arbitration binding on manufacturers.[12]

Airline Passengers. Consumer-protection rules have also allowed domestic air travelers—such as David Dao, the passenger recently dragged off an overbooked United Airlines jet—to obtain legal recourse against the airlines.[13] The Department of Transportation, relying on its broad authority to prohibit "unfair or deceptive practice[s]," 49 U.S.C. § 41712(a), has banned any restriction on passengers' right to sue airline carriers, 76 Fed. Reg. 23110, 23155 (Apr. 25, 2011). And because the industry has been drafting its carriage contracts accordingly,[14] passengers have been able to vindicate their legal rights in court.

Students. Recognizing that unscrupulous and fraudulent for-profit educational institutions have

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[12] *See supra* 2009 Audit at 28 (noting that arbitration is "binding on participating manufacturers but not on the consumer"); Marc Winermar, *2015 Audit of BBB Auto Line*, Better Bus. Bureau 2, https://perma.cc/QD9F-QJEC (2016) ("Manufacturers participating in BBB Auto Line [including Bentley, Ford, General Motors, Hyundai, Kia, Mazda, Nissan, and Volkswagen] exceed Federal (and some state) requirements in a profoundly important way: although the consumer isn't bound by the results of arbitration, manufacturers are bound so long as consumers accept those results.").

[13] *See* Daniel Victor & Christopher Drew, *United Airlines Reaches Settlement With Passenger Who Was Dragged Off Plane*, N.Y. Times (Apr. 27, 2017), http://nyti.ms/2qbJcsn.

[14] *See, e.g.*, *International General Rules*, Am. Airlines (2017), https://perma.cc/ZNS8-NQZ9; *Domestic General Rules Tariff*, Delta (June 21, 2017), https://perma.cc/U365-NW3S; *Contract of Carriage*, JetBlue Airways (May 16, 2017), https://perma.cc/5HQN-YU28; *Contract of Carriage Document*, United Airlines (June 23, 2017), https://perma.cc/JJV4-UMGC.

drained tens of billions of dollars in taxpayer money, [15] the Department of Education has recently streamlined its borrower-defense rules and procedures. Under its broad authority to define defenses against the repayment of a loan, 20 U.S.C. § 1087e(h), the Department has prohibited schools participating in its direct loan program from entering into pre-dispute agreements that mandate arbitration or waive students' right to participate in class actions lawsuits, 81 Fed. Reg. 75926 (Nov. 1, 2016). And following the promulgation of the rule, lenders have adjusted their practices accordingly.[16]

Employee Benefits. Regulators have also stepped in where they have seen a risk that stronger parties will impose unfair procedures.[17] The Department of Labor, for example, has issued a rule under ERISA to ensure "full and fair review" of an adverse-benefit decision. 29 U.S.C. § 1133(2). Workers who are denied benefits under plans covered by Title I of ERISA may not be subjected to mandatory arbitration unless they are allowed to challenge the arbitral decision. 65 Fed. Reg. 70246, 70253 (Nov. 21, 2000).

Farmer's Insurance. To ensure a fair and efficient insurance marketplace, the Department of Agriculture

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[15] *See For Profit Higher Education: The Failure to Safeguard the Federal Investment and Ensure Student Success*, Health, Education, Labor and Pensions Committee (July 30, 2012), https://perma.cc/4PY2-9HTZ.

[16] *See, e.g.*, Stephen Wagner, *The Department of Education lays out new borrower defense to repayment regulations*, University Risk Mgmt. & Insurance Ass'n (Jan. 10, 2017), https://perma.cc/CTP9-LK79.

[17] David S. Schwartz, *Enforcing Small Print to Protect Big Business: Employee and Consumer Rights Claims in an Age of Compelled Arbitration*, 1 Wis. L. Rev. 33 (1997) (discussing the procedural disadvantages of compelled arbitration for employees).

relied on its general authority to interpret its substantive statute's provision of a right to appeal a denial of a claim, 7 U.S.C. § 1508(j), and clarified that arbitration between insurers and farmers is non-binding, 69 Fed. Reg. 48652, 48654 (Aug. 10, 2004).

Broadband Customers. Other agencies have also begun considering similar rules under their longstanding general rulemaking authority. In December 2016, the Federal Communications Commission stated that it would seek comments on a rule to prohibit broadband internet access service providers from compelling arbitration in their contracts with customers. *See* 81 Fed. Reg. 87274, 87318 (Dec. 2, 2016); *see also* 81 Fed. Reg. 23360, 23393 (Apr. 20, 2016).

2. In recent years, agencies have also increasingly limited arbitration through conditional rules.

Nursing-Home Residents. The Department of Health and Human Services has issued regulations designed to help the families of those, like Richard Embry, who suffered from fatal neglect and were unable to obtain legal recourse.[18] In acting to limit arbitration in nursing homes, HHS invoked its general delegated authority to require that a facility "meets" certain "requirements" in order to receive Medicare or Medicaid funds. 42 U.S.C. § 1396r(a)(3). As a result of the Nursing Home Reform Act, a nursing facility receiving federal funds "must" agree to "protect and promote the rights of each resident" by complying with a list of substantive and procedural "Residents' Rights." 42 U.S.C. § 1396r(c)(1)(A). The agency decided that, to qualify for

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[18] *Worker and Consumer Advocates Call on Congress to Pass the Arbitration Fairness Act and Stop Forced Arbitration*, Public Citizen (May 7, 2013), https://perma.cc/BBU8-RLRW.

federal funds, a nursing facility may enter into an arbitration agreement with residents only after a dispute has arisen. *See* 81 Fed. Reg. 68688 (Oct. 4, 2016).[19]

Retirement Investors. Similarly, Congress gave general authority to the Department of Labor, through ERISA, to "grant a conditional or unconditional exemption of any fiduciary or transaction." 29 U.S.C. § 1108(a). To be eligible for an exemption from a rule regarding conflicts of interest in retirement advice, investment advisors and others covered by the rule may not limit their customers' "right to participate in a class action in court" but may otherwise require arbitration. *See* 81 Fed. Reg. 21002, 21020 (Apr. 8, 2016). In enacting this rule, the agency concluded that the "ability to bar investors from bringing or participating" in a class action "would undermine important investor rights and incentives for Advisers to act in accordance with the Best Interest standard." *Id.* at 21043.[20]

Foreign Exchange Customers. Agencies have also promulgated conditional rules to ensure the efficiency of the financial markets. Following the enactment of the Dodd-Frank Act, the Treasury Department limited the arbitration of disputes arising out of foreign-currency off-exchange transactions with retail customers. Congress authorized the agency to allow off-exchange transactions only if subject to certain restrictions of its choosing. 7 U.S.C. § 2(c)(2)(E)(ii)(I). Even though the statutory authority was silent on arbitration, the Federal Deposit Insurance Corporation allowed these transac-

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[19] The Department has recently proposed revisions to the rule. 82 Fed. Reg. 26649 (June 8, 2017).

[20] *See also* 82 Fed. Reg. 31278 (July 6, 2017) (seeking public input on whether to delay in the January 1, 2018, applicability date of the DOL fiduciary rule).

tions on the condition that there be no pre-dispute arbitration agreements between customers and state banks. 76 Fed. Reg. 40779, 40787 (July 12, 2011). *Cf.* 76 Fed. Reg. 41375, 41381 (July 14, 2011) (Office of the Comptroller of the Currency rule prohibiting national banks and federal branches of foreign banks from mandating arbitration).

C. A lack of agency action has also prompted Congress, in some cases, to specifically mandate limits on arbitration.

In addition to the actions described above, a lack of agency regulation has in some cases led Congress to explicitly mandate that agencies take steps to regulate arbitration. In 2006, for example, Congress reacted to reports finding that military servicemembers were being targeted by predatory lenders to such an alarming degree that their activities constituted a threat to national security.[21] Congress's response was the Military Lending Act, which bans forced arbitration in consumer loans to servicemembers. *See* 10 U.S.C. § 987(e).[22] Simi-

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[21] *See Report On Predatory Lending Practices Directed at Members of the Armed Forces and Their Dependents*, Dep't of Defense (Aug. 9, 2006), https://perma.cc/UJ8Z-2SG9; *see also* Christopher Lewis Peterson & Steve Graves, *Predatory Lending and the Military: The Law and Geography of 'Payday' Loans in Military Towns*, 66 Ohio State L.J. 653 (2005).

[22] The Department of Defense has exercised its authority to issue regulations expanding the scope of that ban, *see* 80 Fed. Reg. 43560 (July 22, 2015), and the lending industry has taken steps to comply. *See Military Lending Act: Great Expectations in Compliance*, Carolinas Credit Union League (2016), https://perma.cc/25CG-HYSG (discussing the DOD's rule); *Military Lending Law Developments*, Utah Bankers Association (Oct. 25, 2016), https://perma.cc/T6YG-RYZ6 (same); Tony Hadley, *Must-Know Details About the Military Lending Act in 2016*, Experian (Feb. 29, 2016), https://perma.cc/7BJB-9JGD; *Attention! Military Lending Act*

larly, when Congress created the new Consumer Financial Protection Bureau, it responded to the lack of action by existing financial regulators to halt the spread of forced arbitration by requiring the new agency to study the problem and, if warranted, to limit it.[23]

The lesson to be drawn from these more specific congressional delegations is *not* that such delegations are necessary (as opposed to sufficient) for agency action. Agencies often already have the authority to act by virtue of the substantive laws they administer. Rather, it is when Congress seeks to *mandate* limits on arbitration that it has "done so with a clarity that far exceeds" a general statutory delegation. *CompuCredit*, 565 U.S. at 103 (addressing what statutory language is necessary to discern an intent to "prohibit" arbitration agreements).

II. The employers' novel reading of the FAA cannot be reconciled with *McMahon* and decades of agency rulemaking.

The employers principally stake their case on the theory that the National Labor Relations Act and Norris-LaGuardia Act's do not grant employees a substantive right to pursue employment-related claims on a collective-action basis. That theory is unfounded for the

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Compliance, Microbilt (2016), https://perma.cc/98SA-E38J; *see also Promissory Note*, Discover 3 (May 2017), https://perma.cc/4M9R-7S3D ("[T]his section, Arbitration of Disputes, does not apply if . . . you are covered by the federal Military Lending Act.").

[23] *See* 12 U.S.C. § 5518 (mandating that the agency conducts a study to assess the impact of arbitration on consumers and authorizing it to prohibit or limit arbitration if it found that doing so would be "in the public interest and for the protection of consumers"); 81 Fed. Reg. 32830, 32830 (May 24, 2016) (adopting a rule to "prohibit providers from using a pre-dispute arbitration agreement to block consumer class actions in court" and require companies "to submit certain records relating to arbitral proceedings to the Bureau").

reasons set forth in the employees' and NLRB's briefs. *See* AFLCIO Br. 9-28; Lewis Br. 9-25; Morris & McDaniel Br. 14-30; NLRB Br. 11-35.

But the challengers also press a second-line argument that is both broader and less precise. Under the employers' view, agencies that regulate under general statutory grants of rulemaking authority would, in effect, be categorically prohibited from promulgating rules that regulate the role of arbitration. *See* Chamber of Commerce Br. 21, 31; Ernst & Young Br. 50; *see also* Murphy Oil Br. 11. That theory, however, is squarely foreclosed by this Court's decision in *McMahon*.

A. *McMahon* held that the FAA does not interfere with an agency's broad authority to regulate arbitration under a general grant of rulemaking authority.

Thirty years ago, this Court recognized that a federal agency does not run afoul of the FAA's pro-arbitration policies when it employs its general authority delegated from Congress to regulate and restrict arbitration procedures where "necessary or appropriate to further the objectives" of a federal statute or to "protect statutory rights." *McMahon*, 482 U.S. at 233–34. That recognition—which has never been overturned or called into question by this Court—forecloses the employers' unduly cramped view of agency authority here.

In *McMahon*, the SEC's congressionally delegated authority to regulate was general—it said nothing specific about arbitration—and yet this Court definitively ruled that the congressional grant of authority nonetheless gave the SEC "expansive power" and "broad authority" to regulate "arbitration procedures." *Id.* at 223. That authority, the Court explained, readily allowed the agency to "mandate the adoption of any rules [the

SEC] deems necessary to ensure that arbitration procedures adequately protect statutory rights." *Id.* at 234 (concluding that Congress's general-delegation clause afforded the agency "sufficient statutory authority" for this sort of regulation). And the Court blessed the SEC's authority in this respect notwithstanding the FAA's "federal policy favoring arbitration." *Id.* at 226.

Not surprisingly, then, FAA-based challenges to the SEC's rulemaking authority since *McMahon* have been soundly rejected. *See Charles Schwab & Co. v. FINRA*, 861 F. Supp. 2d 1063 (N.D. Cal. 2012); *In re Dep't of Enforcement v. Charles Schwab & Co.*, 2014 WL 1665738 (FINRA Bd. Apr. 24, 2014). And this Court has never suggested that a federal program offends the FAA merely by encouraging participants in the program to forgo arbitration or placing conditions on its use. Indeed, as we explained in Part I, many agencies—no different than the SEC—have long exercised similar regulatory authority under general-delegation clauses that span the U.S. Code.

In this respect, the Court's decision in *McMahon* enshrined a basic (and still controlling) principal of agency authority: that the question in every case involving an agency's power to regulate "is, simply, whether the statutory text forecloses the agency's assertion of authority, or not." *City of Arlington*, 133 S. Ct. at 1871. *McMahon*, in other words, recognized that, when it comes to agency rulemaking, "the whole includes all of its parts." *Id.* at 1874. A "general conferral of rulemaking authority," in other words, "validate[s] rules for *all* the matters the agency is charged with administering." *Id.*

Yet, embracing the employers' broadside attack on this settled and uncontroversial rule of administrative law would unavoidably require overruling *McMahon*

and, in the process, upset four decades of agency practice.

B. *CompuCredit* does not undermine *McMahon*.

The employers rest their sweeping attack on the longstanding framework governing agency regulation on this Court's decision in *CompuCredit*. That case, they argue, established a new rule of agency law—that a clear, arbitration-specific statutory grant of rulemaking authority is required before an agency may engage in rulemaking that addresses arbitration. *See, e.g.*, Ernst & Young Br. 50; Chamber of Commerce Br. 21, 31; Murphy Oil Br. 11.

But *CompuCredit* erected no such rule for a simple reason: the case did not implicate any agency regulation. To the contrary, the only question *CompuCredit* addressed was how to discern when Congress has *itself* decided to prohibit arbitration. Specifically, the case addressed whether a statute—the Credit Repair Organizations Act—contained a sufficiently clear "contrary congressional command" to override the presumption that CROA-related statutory claims may be validly arbitrated. *See* 565 U.S. at 98. And, because nothing in CROA's text, legislative history, or underlying purposes evinced a clear intent to bar claims from proceeding in arbitration, the Court concluded that "the FAA requires the arbitration agreement to be enforced according to its terms." *Id.* at 104 (citing, without limitation, *McMahon*'s test for determining whether a statute overrides the FAA's mandate). But what *CompuCredit* did not do was announce a new and unprecedented rule of agency law.

C. Respect for statutory *stare decisis* and settled reliance weigh against adoption of the employers' sweeping reading of the FAA.

There are other reasons to reject the employers' bid for such a radical departure from settled precedent. *Stare decisis*, the "foundation stone of the rule of law," *Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2036 (2014), carries "enhanced force" in statutory interpretation cases like this one. *Kimble v. Marvel Entm't, Inc.*, 135 S. Ct. 2401, 2409 (2015). As this Court explained just two Terms ago in *Kimble*, so long as there is a "reasonable possibility that parties have structured their business transactions" according to preexisting law, it should be left to stand. *Id.* at 2410. And that lesson is particularly true, this Court stressed, in cases that involve "contract rights." *Id.* In this context, "considerations favoring *stare decisis* are at their acme." *Id.* (internal quotation marks omitted). To trump this "superpowered form of *stare decisis*" requires a "superspecial justification." *Id.*

Here, overruling statutory precedents and replacing the settled principles governing agency rulemaking would spark profound confusion across industries. Overnight, regulations promulgated by over a dozen agencies under their general delegated statutory authority could become infirm, jeopardizing the settled expectations and reliance interests of farmers, students, airline passengers, workers, and nursing-home patients alike. Those stakeholders in the financial industry, too, would be out to sea. As a matter of *stare decisis*, endorsing the employers' sweeping view—and the real-world consequences that would follow—would be unwarranted. But, the employers' invitation to do so in this case is all the more inappropriate given that the case before the

Court here does not involve a challenge to a regulation at all.

Ultimately, the employers offer no reason at all—let alone any "superspecial justification"—to effectively overrule either *McMahon* or decades of settled agency practice and longstanding agency rules.

CONCLUSION

The judgments of the Seventh and Ninth Circuits in Nos. 16-285 and 16-300 should be affirmed, and the judgment of the Fifth Circuit in No. 16-307 should be reversed.

Respectfully submitted,

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